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ALEXANDER

No. 82-196

In the Supreme Court of the United States

OCTOBER TERM, 1982

SALVATORE CIRAMI AND MARGARET CIRAMI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In this federal tax case, petitioner[1] seeks review of the district court's factual conclusion that he failed to prove entitlement to relief from judgment under Fed. R. Civ. P. 60(b)(6). Petitioner's request for relief was predicated on his contention that his then counsel suffered from a mental disorder that resulted in inadequate representation.

The pertinent facts may be summarized as follows: In 1966, the Internal Revenue Service issued a notice of deficiency in income taxes to petitioner as a result of the disallowance of certain deductions claimed by him for the taxable years 1961 through 1963 in the operation of Air Freight Haulage Company (I-A. A42).[2] The deductions had been

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[1]Only Salvatore Cirami was a party to the appeal for which review is requested. Margaret Cirami never filed a notice of appeal. Salvatore Cirami is the sole petitioner properly before this Court.

[2]"I-A." and "II-A." references are to volumes one and two, respectively, of the Joint Appendix in the court of appeals.

disallowed for lack of substantiation. Petitioner neither sought review of the proposed deficiencies in the United States Tax Court nor paid the deficiencies to enable him to institute a refund suit in the district court. In 1967, the government assessed the taxes resulting from the deficiencies (I-A. A51), and in 1973 the government brought suit both to reduce the assessments to judgment and to set aside numerous fraudulent transfers of property from petitioner to his family (Pet. App. 2a-3a, 7a).[3]

Petitioner employed Peter R. Newman to represent him and respond to the government's complaint, but engaged him only three days before an answer to that complaint was due (Pet. App. 2a).[4] Newman timely filed a general denial and later a counterclaim (Pet. App. 2a-3a). Newman thereafter traveled to Puerto Rico and Washington, D.C., in an attempt to construct a case for petitioner. Neither petitioner nor his accountant was able to provide Newman with any records to substantiate the disallowed deductions. Petitioner told Newman to see his accountant for the records. Petitioner's accountant told Newman and government counsel that the records were lost. Although petitioner now claims that he had possession of substantiating records, he obviously knew that Newman did not have them (Pet. App. 3a; II-A. A371-A372, A376-A377).

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[3]Although the taxes in question were assessed in 1967, the Service has been unable to collect them because petitioner transferred his property to various family members. The government was constrained in its collection efforts because of the pendency of criminal proceedings against petitioner, which were finally resolved in 1975. *United States* v. *Ciraml*, 510 F. 2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975). Indeed, the government filed its complaint in this case before criminal proceedings against petitioner were completed in order to toll the six-year statute of limitations on collection of assessed taxes (26 U.S.C. 6502(a)).

[4]At the time Newman was hired, petitioner failed to tell him about the pending criminal matters (II-A. A310).

In December 1973, the government filed its motion for partial summary judgment on the issue of the underlying tax liability. A status conference on this motion was held in January 1974, which Newman attended. A further conference was held in February 1974, which Newman also attended and at which he requested more time to garner substantiating records. The district court gave Newman two additional weeks. At this time, Newman confirmed to government counsel that he could not obtain any records. Newman thus did not, because he could not, file a response to the summary judgment motion. The motion was granted in March 1974. Newman attended the next two status conferences in April 1974 and June 1974. Judgment was entered by the district court in July 1974, in the amount of $270,792.43, plus interest from that date. Newman was replaced as counsel for petitioner in October 1974 (Pet. App. 3a-5a, 7a-8a; I-A. A74-A75; II-A. A435).

In 1975 petitioner moved the district court, under Fed. R. Civ. P. 60(b)(6), to set aside the judgment. That motion was denied, and the court of appeals affirmed (Pet. App. 7a; 535 F. 2d 736 (1976)) and denied rehearing on June 1, 1976. Thereafter, petitioner, claiming "new evidence," filed a second Rule 60(b)(6) motion to set aside the judgment. The new evidence was the alleged mental illness of Newman. The district court rejected this contention as untimely, but the court of appeals reversed and remanded the case for a hearing to determine whether Newman had a mental illness and whether that illness resulted in the absence of responsive pleadings to the government's motion for partial summary judgment (Pet. App. 7a; 563 F. 2d 26 (1977)). After exhaustive hearings, the district court concluded that Newman's mental health problems, whatever they may have been, were not the cause of his failure to oppose the government's summary judgment motion (Pet. App. 2a). Rather, the district court determined that Newman's failure

to respond was due to petitioner's failure to provide records to oppose the motion (Pet. App. 4a, 8a). Accordingly, the district court denied petitioner's second Rule 60(b)(6) motion. The court of appeals determined that the district court's fact findings were not clearly erroneous and affirmed (Pet. App. 7a-10a).

1. Petitioner accuses the district court of prejudice in determining his Rule 60(b)(6) motion to set aside the judgment and asks this Court to set aside the district court's factual findings as clearly erroneous. His accusation of bias on the district court's part is completely unfounded, for that court expressed deep concern with petitioner's allegations (II-A. A454-A463). After days of testimony and observation of the witnesses, that court found, however, no factual basis to the petitioner's allegations and determined that petitioner had thus failed to make the requisite showing of "exceptional circumstances" warranting relief under Rule 60(b)(6). As petitioner recognizes (Pet. 9), this factual determination is reviewable under the clearly erroneous rule.

Petitioner renews his argument to the courts below that Newman's failure to oppose the government's motion for summary judgment was due to a mental disorder suffered by Newman. But the district court's factual finding, that Newman's failure to oppose the summary judgment motion was not due to a mental disorder, was found by the court of appeals to have ample support in the record (Pet. App. 9a). The district court found no convincing evidence that Newman suffered from a mental illness in 1973 and 1974 that led him to mishandle petitioner's case (Pet. App. 5a, 9a). Newman was diligent and timely in addressing other aspects of the case. He was present at court conferences before and after the summary judgment motion was made and granted. His only medical treatment, voluntarily sought, ended in 1971. There was no expert testimony that Newman suffered

any mental problem during the relevant period. Newman's difficulties with the bar association occurred years later and were, in any event, not related to a mental disorder (Pet. App. 2a-5a, 8a-9a).

The real cause for Newman's failure to respond to the government's summary judgment motion was that he was never given records to rebut the tax assessments, although Newman sought documentation in support of petitioner's claimed deductions (Pet. App. 3a-4a, 8a). Newman therefore had nothing upon which to base a defense.[5] Neither Newman nor any government employee has ever seen the substantiating records which petitioner claims once existed but are now lost.[6] The only records ever produced by petitioner—all after the fact—are of his own authorship. Not one cancelled check, invoice, or third-party document of any kind has ever surfaced to support petitioner's claimed deductions. The documents that petitioner did produce, which are reproduced in part (I-A. A91-A144), serve only to confirm that Newman, had he had access to them, would have possessed nothing with which to construct a defense to the government's motion for partial summary judgment.

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[5]Petitioner's reliance (Pet. 5) upon *Cohan* v. *Commissioner*, 39 F. 2d 540 (2d Cir. 1930), for the proposition that substantiating records are not necessary, is misplaced. The *Cohan* rule presumes the proven existence of business activity, not merely an assertion to that effect.

[6]Petitioner's statement (Pet. 6 n.6) that cancelled checks were seen by the original IRS auditor is without support in the record.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982